No. 10251

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DAVID C. JEFFCOTT and ELSIE JEFFCOTT, his wife,

Appellants,

vs.

EDWARD J. DONOVAN,

Appellee.

BRIEF OF APPELLANTS.

DARNELL & ROBERTSON,
410 Valley National Building, Tucson, Arizona,
Attorneys for Appellants.

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Jurisdiction.

This is an action filed by Edward J. Donovan, a resident of the State of New Jersey, in the District Court of the United States for the District of Arizona against David C. Jeffcott and Elsie Jeffcott, his wife, both of whom are residents of the State and District of Arizona.

The trial was had upon plaintiff's amended complaint [Tr. p. 5], and the issues joined by defendants' answer [Tr. p. 1], pursuant to stipulation [Tr. p. 67] permitting the filing of the amended complaint and providing that the original answer would stand as to the amended complaint. In the complaint the plaintiff seeks to recover the balance of $10,000.00 claimed to be owing for professional services rendered by the plaintiff to the defendants for an operation

and medical attention rendered the infant son of said defendants, Robert Crawford Jeffcott. The plaintiff charged $12,500.00 and had been paid $2,500.00 prior to the filing of the action. The complaint alleged that the sum of $12,500.00 was the reasonable value of such services. Defendants' answer denies this allegation and alleges that the sum of $2,500.00 was adequate compensation. After trial in the District Court of the United States for the District of Arizona in Tucson, Arizona, commencing before the court on the 29th day of January, 1942, and continuing thereafter on the 29th, 30th and 31st of January, and the 2nd and 3rd of February, judgment was ordered for the plaintiff [Tr. p. 24] in the sum of $7,500.00, less a credit of $2,500.00, or a net recovery of $5,000.00. Counsel was ordered to prepare and submit findings of fact and conclusions of law and form of judgment. Preliminary findings of fact, etc. [Tr. p. 26] were filed by the plaintiff. Objections to findings of fact and conclusions of law were filed by the defendants [Tr. p. 36] and offered amended and additional findings of fact were filed [Tr. p. 40]. The court entered its order thereon [Tr. p. 43] and final findings of fact and conclusions of law [Tr. p. 44] were made by the court on April 10th, 1942. Objections to final findings of fact and conclusions of law were filed by the defndants [Tr. p. 55] which were overruled by order of the court [Tr. p. 58] and formal judgment was entered [Tr. p. 59] awarding the plaintiff $5,000.00, with interest at 6% from the date of entry of judgment. A motion for new trial was filed [Tr. p. 62], with memorandum in support thereof [Tr. p. 63], which was denied by order of court [Tr. p. 67]. Notice of appeal was filed on July 8th, 1942 [Tr. p. 69] and a cash bond in the sum of $5,250.00 was filed on July 8th, 1942, pursuant to stipula-

tion of counsel [Tr. pp. 67-68], which stipulation was approved by order of court entered July 8th, 1942 [Tr. p. 69]. An order extending time for filing abstract of record was entered August 3rd, 1942 [Tr. p. 73], extending such time for thirty days from and after August 17th, 1942. Designation of record on appeal [Tr. p. 24] was filed August 19th, 1942, and defendants' statement of points on appeal was filed on the same date [Tr. p. 76]. A certified written transcript of record of the clerk of the District Court was filed with the clerk of the United States Circuit Court of Appeals on September 15th, 1942. Appellants' statement of points on appeal and designation of parts of record was filed in the office of the clerk of this Court on the 21st day of September, 1942. The transcript of record of the clerk was mailed to appellants on October 9th, 1942, and notice directed to attorneys requiring appellants' brief to be filed not later than November 11th, 1942.

Statement of the Case.

David C. Jeffcott and Elsie Jeffcott, his wife, came to Arizona in 1936 because Mr. Jeffcott was suffering from tuberculosis of the lungs [Tr. p. 418]. He was forced to lead an inactive life and at that time was living on the income and a certain amount of the principal from a gift of stocks and bonds made by his father in 1935, such stocks and bonds having a market value of between $75,000.00 and $100,000.00 on the date of the gift [Tr. p. 419]. In December of 1936 Mr. Jeffcott made a down payment on a cattle ranch located near Patagonia, Arizona, of $50,000.00 [Tr. p. 420]. The ranch was bare and in a run-down condition and after getting possession late in 1937

he undertook to stock the ranch and rehabilitate [Tr. pp. 421-423]. He exhausted the money he had received from the sale of the stocks and bonds given him by his father [Tr. p. 423] and he was forced to borrow additional money from his father under an arrangement whereby his father agreed to loan him money until the ranch was stocked and put on a paying basis, with the understanding that when the total amount was determined, a real estate and chattel mortgage would be executed to bear interest at the rate of 3½% per annum and to be amortized over a period of years [Tr. pp. 425-426]. Mr. Jeffcott kept his books on a cash basis for 1937, 1938 and the first half of 1939 and an auditor set up his books on an accrual basis on June 30th, 1939 [Tr. p. 426]. A real estate and chattel mortgage in the sum of $69,500.00 [Tr. p. 437] was executed in August of 1939 with his mother named as the mortgagee [Tr. p. 424]. In view of the run down condition of the ranch and the necessity for building up a herd, the ranch operations during 1938 showed a loss of $14,-572.37 [Tr. p. 23]. Mr. Jeffcott's personal income amounted to $403.22; his personal expenses, $15,572.72, in view of the fact that he was required to pay $5,517.72 [Tr. p. 23] Federal income tax on the stocks and bonds which had been transferred to him by his father. Many items of expense which would normally have been charged to ranch operations were shown in his personal expenses for that year as the books were not properly set up [Tr. pp. 431-432]. During 1939 his total income from cattle inventory increase and sales was $16,932.83 and ranch expenses were $17,362.91, or a loss of $430.09 [Tr. p. 23]. His personal expenses for that year were $12,983.47, which included between $6,000.00 and $6,500.00 worth of expense incurred on behalf of his infant son, Robert Craw-

ford Jeffcott 2d, who was operated by Dr. Donovan and who received $2,500.00 on account which was included in such personal expenses [Tr. pp. 432-433]. In 1940 the ranch operations showed a loss of $1,783.50. Mr. Jeffcott had personal income of $130.00 and personal expenses of $6,305.32. In 1941 his ranch operations showed a loss of $1,331.33 [Tr. p. 23]. He received personal dividends of $90.00 and his personal expenses were $6,277.82 [Tr. pp. 435-436]. In 1942, assuming the market to remain constant, he anticipates a net profit from ranch operations of between $5,000.00 and $8,000.00 [Tr. p. 436]. During these expansion and development years, it was necessary for the mortgage to be increased by continued borrowing from his father so that the mortgage at the time of trial amounted to $128,292.37. His equity at that time was $57,667.19 [Tr. p. 437]. At the time of the operation which was performed by Dr. Donovan on April 1st, 1939, the mortgage was approximately the same as it was on June 1st, 1939, to-wit, $69,500.00, and his equity was approximately $79,613.91 [Tr. p. 437].

On March 25th, 1939, Robert Crawford Jeffcott, 2d, was born to David C. Jeffcott and Elsie Jeffcott, his wife, in the Desert Sanatorium in Tucson, Arizona [Tr. p. 82]. Dr. William D. Carrell delivered the baby and after complications developed, Dr. Hugh Thompson and Dr. Vivian Tappan attended as pediatrician and consultant. On Friday, March 31st, 1939, it was determined that the child had an intestinal obstruction and it was agreed between the doctors that Dr. Edward J. Donovan of New York City be employed to operate. At the suggestion of these doctors, Mr. Jeffcott agreed to such employment and Dr. Hugh Thompson called Dr. Donovan.

Dr. Donovan was selected because he is one of, if not the most outstanding baby surgeon in the country. Dr. Thompson so testified [Tr. p. 148]; Dr. Donovan narrated his qualifications [Tr. pp. 163-178]; Dr. Downes so testified [Tr. p. 299]; Dr. Burdick so testified [Tr. p. 344]; and Dr. Beekman so testified [Tr. p. 388]. Prior to this operation Dr. Donovan had performed eighteen similar operations, for fourteen of which he had made no charge. He had charged $1,000.00 for one case, $2,500.00 for another, $350.00 for another, and $250.00 for the other [Tr. pp. 253-254]. His gross annual earnings for the year 1939, including the $2,500.00 paid by Mr. Jeffcott, were $40,887.05 [Tr. p. 262].

At first it was planned to take the baby, a physician and a nurse to New York, but upon Mr. Jeffcott's suggestion, Dr. Donovan was called again and he consented to come to Tucson for the operation [Tr. pp. 483-487]. Dr. Thompson asked Mr. Jeffcott if money or expense was any object and Mr. Jeffcott testified [Tr. p. 88] that it should not cost much more to have the doctor come to Tucson than to take the doctor, baby, nurse and paraphernalia to New York [Tr. p. 88]. Dr. Thompson testified [Tr. p. 134] that when he asked Mr. Jeffcott if money was any object, that his response was simply "no". Dr. Donovan testified [Tr. p. 180] that he was contacted on Saturday, April 1st, 1939, while in Atlantic City, New Jersey, on vacation. He agreed, after the second telephone call, to fly to Tucson, Arizona, leaving Saturday night from Newark, New Jersey. He left Newark at 6:10 Saturday evening, April 1st, arriving in Tucson, Arizona, at 6:30 Sunday morning, April 2nd. Upon his arrival he consulted with the attending doctors and arranged for the operation [Tr. pp. 183-

184]. He operated the baby Sunday morning, performing an operation for intestinal obstruction which is described in detail [Tr. pp. 185-190]. The operation was successful and Dr. Donovan remained in Tucson until Monday morning, leaving at approximately 11:00 o'clock a. m. April 3rd [Tr. p. 215]. He arrived back in New York at approximately noon Tuesday, April 4th. Thereafter Dr. Donovan received several letters from Dr. Thompson and discussed the patient's condition on several occasions by telephone when a fecal fistula developed [Tr. pp. 141-142]. This condition existed for some time and Dr. Thompson and Dr. Carrell remained in attendance upon the baby for several months [Tr. pp. 142-143]. The baby was kept in the hospital for approximately six weeks after the operation [Tr. p. 461] and after he was taken home the fistula was still draining and continued for between eight months and a year after the operation. A ventral hernia developed, which exists at the present time [Tr. pp. 461-462] and which will necessitate another operation.

Mr. Jeffcott and Dr. Donovan did not discuss the amount of his charges while Dr. Donovan was in Tucson. Mr. Jeffcott testified [Tr. p. 93] that he had no opportunity to do so prior to the operation, or immediately thereafter, and being required to leave Sunday evening, he expected to return Monday and discuss the matter with Dr. Donovan, who originally planned to leave in the afternoon, and upon his return found that Dr. Donovan had departed. Dr. Donovan testified [Tr. p. 222] that he did not feel it his place to approach Mr. Jeffcott about his fee. On May 1st, 1939, Dr. Donovan mailed his statement for $12,500.00 to Mr. Jeffcott [Tr. p. 8, Pltfs. Exh. No. 1].

On May 22nd, 1939, Mr. Jeffcott wrote a letter to Dr. Donovan expressing appreciation for his services, narrating generally his financial circumstances, and requesting a reconsideration of the amount of charge [Tr. p. 8, Pltfs. Exh. No. 2]. On August 14th, 1939, Mr. Jeffcott wrote Dr. Donovan stating that his offer to reduce his bill to $7,500.00 was just as impossible for Mr. Jeffcott to pay as was the original figure [Tr. p. 11, Pltfs. Exh. No. 3]. He stated that $2,500.00 was the highest figure that any member of the profession in Tucson had considered as being reasonable and enclosed his check therein in the sum of $2,500.00 [Tr. p. 13, Pltfs. Exh. No. 3]. Further correspondence ensued without settlement being effected [Tr. p. 14, Pltfs. Exh. No. 4; Tr. p. 16, Pltfs. Exh. No. 5]. Dr. Donovan's expenses were between $300.00 and $350.00 [Tr. p. 251].

Suit was thereafter instituted by the plaintiff in the District Court of the United States for the District of Arizona, on the 11th day of September, 1940.

Specifications of Errors.

I.

The court erred in its finding of fact No. XXVIII in that it infers a legal obligation on the part of the parents of the defendant, David C. Jeffcott, to advance money and to pay for the services rendered by the plaintiff, which finding is not supported by the evidence and is in conflict therewith. That said finding is also erroneous and misleading in that it sets out in a lump sum the receipts and disbursements over a period of approximately five years which does not show the true financial condition of the parties on the date when the services were rendered by the

plaintiff. Said finding is also erroneous and misleading in that it sets forth a lump sum of personal expenditures without indicating that a portion of said expenditures was for initial ranch expense and also over $6,000.00 for expenses incurred in connection with the illness of the minor son who was operated on by the plaintiff, and said sum also includes $2,500.00 which was paid to the plaintiff.

II.

The court erred in its finding of fact No. XXXI in that the determination of a reasonable fee in the sum of $7,500.00 was contrary to law and the evidence adduced at the trial. was excessive and unreasonable for the following reasons:

(a) That the fee was disproportionate to other fees charged and collected for similar services performed by the plaintiff.

(b) That the fee was disproportionate to the annual income of the plaintiff and represents an excessive charge for the services rendered.

(c) That the fee is excessive and unreasonable in view of the financial ability of the defendants to pay.

(d) That the fee was determined upon an assumption by the court that the defendants' parents were financially obligated to pay said fee.

III.

The court erred in its conclusion of law No. 4 in that the court's conclusion that the sum of $7,500.00 was a reasonable fee for plaintiff's services, was erroneous in that such conclusion was contrary to the law and the evidence adduced at the trial of said cause, was excessive and unreasonable for the reasons stated above in support of point No. II.

IV.

That the judgment of the court made and entered on the 11th day of April, 1942, was not sustained by the law or the evidence adduced at the trial of said cause, was unreasonable and excessive for the reasons stated in support of points Nos. II and III herein.

V.

The court erred in permitting Dr. William A. Downes, a witness for the appellee, to express an opinion as to a reasonable fee for the services rendered by Dr. Edward J. Donovan in response to a hypothetical question propounded by Dr. Donovan's attorney, said hypothetical question being set forth beginning on page 315, transcript, and being concluded on page 326, transcript. The question contained a statement of the doctor's qualifications, the facts surrounding his employment, the operation performed, the results of the operation, but excluded any reference to or evidence of the financial ability of the patient, or those responsible, to pay for such operation. The witness was permitted to answer over the following objections [Tr. pp. 312-315]:

> "Mr. Robertson: Now, if the court please: I object to the question, first because the foundation for the expression of any opinion by this witness has not been established, and, in fact, his own testimony shows that he has no ability to enable him to express an opinion as to a fee in 1939; and for the second reason that it singles out specialists and the fee they are entitled to charge, whereas the law on the subject is that it is only the reasonable charge that is to be made by any surgeon, and the fact that he may be one of the top men, or a specialist in a particular type of surgery is not to be taken into consideration

in the expression of an opinion by any member of the profession, and for the reason that it incorporates facts not in the record.

The Court: Will you indicate what facts that are incorporated in this preliminary question that are not in the record in the case?

Mr. Robertson: Just a second. No, I withdraw that, Your Honor. Did you understand me? I said I withdraw that. But as an additional objection, it excludes from the testimony of this witness in stating his opinion, the element of the ability of the patient to pay. No place is that expressed as one of the considerations he is to take into consideration in expressing an opinion, and the law is that it must be considered in expressing an opinion.

The Court: The same question was presented here when Dr. Thompson was on the stand.

Mr. Robertson: Yes, sir.

The Court: And the court ruled, sustained the objection to the question, that the element was not in it.

Mr. Robertson: I want to give you a chance to change your mind.

The Court: I think I will be consistent, at least. I want to say this to counsel: I have in a hasty way examined these depositions, and if I have read them correctly, the hypothetical question is practically the same. I think there is one sentence that is different. The question propounded is a lengthy one, and I presume counsel will have occasion to point out to the court the objections that may be raised to this question. I would not want to be hasty in ruling. If there is some question now that has not had the consideration of the court, I would hear counsel and rule further on that.

Mr. Robertson: I believe, Your Honor, that at the conclusion of one of these depositions, by some kind of stipulation or agreement as to objections I will have to voice to the material part of the other two depositions, that we can dispense with the ruling on them. I do not believe that the opinions of these doctors are admissible, first, because they show that they have no knowledge of any general fee schedule or any general system. They all admit that the ability of the patient to pay in New York is considered as one of the elements, but the hypothetical question that was propounded to them, and upon which they expressed an opinion, does not contain that element, and I do not, therefore, believe the depositions, except for the qualifying parts, are admissible in any sense of the word.

The Court: Now, as I indicated to counsel during the morning session, I have read these three depositions through, and I do not see the occasion of going through the depositions again now. They are here subject to the objections that are made, or that counsel desires to make to them, and as to the rulings on these depositions, it seems to me that these are matters that the court can rule upon in the final conclusion of the case. I do not see the occasion for going through the depositions again now, and the counsel can, at the proper time, furnish the court with a memorandum brief on the particular points they desire to raise on the depositions.

Mr. Allen: In other words, the court's ruling is reserved and counsel will be permitted to submit a memorandum to the court on the admissibility.

The Court: Your objections are in the record, and the court will then have an opportunity to rule on them, when the case is all through.

Mr. Robertson: Yes, sir.

Mr. Allen: The answer to that last question is 'Yes'.

It is stipulated by and between counsel for the respective parties that the following questions, and objections, being that part of the deposition of William A. Downes, a witness on behalf of the plaintiff, not read into the record at the time of the trial of this case, and the depositions of Carl G. Burdick and Fenwick Beekman, witnesses on behalf of plaintiff, and taken at the instance of the plaintiff, before Albert Gerber, a notary public, on the dates hereinafter and heretofore mentioned, are herewith incorporated into the transcript of testimony and, pursuant to this stipulation, are to be considered as though read and objections made at the trial of this case."

(Hypothetical question then propounded and answer made [Tr. p. 326]. Defendants' objections were overruled by order of court [Tr. p. 24].)

VI.

That the court erred in permitting Dr. Carl G. Burdick, a witness for the appellee, to express an opinion as to a reasonable fee to be paid Dr. Edward J. Donovan for services rendered over defendants' objections (being the same as were made to the hypothetical question propounded to Dr. William A. Downes and set forth in Specification of Error No. V above), the hypothetical question being the same as was propounded to Dr. Downes and is set forth beginning on page 349, transcript, and ending on page 359, transcript. The answer of the witness, after additional objections, is set forth on page 360,

transcript. This hypothetical question likewise contained no facts showing or tending to show the financial ability of the patient, or those responsible, to pay for such services.

VII.

The court erred in permitting Dr. Fenwick Beekman, a witness for the appellee, to express an opinion as to a reasonable fee to be paid Dr. Edward J. Donovan for services rendered over defendants' objections (being the same as were made to the hypothetical question propounded to Dr. William A. Downes and set forth in Specification of Error No. V above), the hypothetical question being the same as was propounded to Dr. Downes and is set forth beginning on page 393, transcript, and ending on page 404, transcript. The answer of the witness, after additional objections, is set forth on page 404, transcript. This hypothetical question likewise contained no facts showing or tending to show the financial ability of the patient, or those responsible, to pay for such services.

VIII.

The court erred in admitting evidence of the financial condition of the parents of the appellant, David C. Jeffcott, who were in no way obligated to pay for the professional services rendered to the appellants, which evidence was highly prejudicial to the appellants, such evidence and objections thereto being as follows, to-wit [Tr. pp. 99-102]:

"Q. How many children in all do you have? A. We now have three, sir.

Q. The first two were girls? A. Correct, sir.

Q. And this is—What is your father's name? A. My father's name is Robert Crawford Jeffcott.

Q. And this son of yours, Robert Crawford Jeffcott, is your father's first grandson, isn't that correct? A. Yes, sir.

Q. And your father, Robert Crawford Jeffcott, was extremely interested in that son of yours at the time he was born?

Mr. Robertson: I object to the grandfather—

Mr. Allen: The child was named for him.

Mr. Robertson: I happen to have one named for me, too. The grandfather is not a party to this litigation.

The Court: Unless you make a showing as to the materiality, it is not admissible.

Mr. Allen: It is a foundational question leading up to the consideration of the wealth of the Jeffcott family and the importance of this male son in the light thereof, and there seems to be no question but that the seriousness of the operation is a matter that can be taken into account in determining the cost of an operation, just as it seems to be the better line, and now almost universally recognized line of authority that the financial ability or wealth of the parents themselves or the child may be taken into consideration, not only by the surgeon in determining his fee, but by the jury and court.

The Court: I understand that principle but this seems to be a remote situation, so far as the grandfather is concerned.

Mr. Allen: So far as the responsibility placed upon the surgeon in performing this operation, I think he is entitled to bring out any particular aspect which would place an out-of-the-ordinary responsibility as to the particular infant, and that is the theory on which it is offered. It is offered to show that this

particular infant was of outstanding importance and consequently the operation upon him would result in a larger degree the feeling of responsibility upon the surgeon. In other words, it is one of the elements that shows or tends to show the relation between these parties in this employment, and the very nature of the employment. There is a great difference in operating on one infant and another, so far as the responsibility on that surgeon is concerned, because aside from the fact that every man is deemed to have a high degree of affection for and high degree of interest in his offspring, certainly there can be circumstances which make a particular child of outstanding importance to his parents.

Mr. Robertson: I think this child was just about as important to Mr. and Mrs. David C. Jeffcott as any child ever born, but I do not see how that could make this line of testimony material. It might cast a sentimental reflection upon the lawsuit, to say that the child was named for its grandfather. He is the only male grandchild, and for that reason he may perhaps be worth a little bit more to Mr. and Mrs. Jeffcott, but we are in a court of law now, determining what is a reasonable fee for the operation, and unless the grandparents, uncles or aunts or someone else has some financial responsibility for the payment of this fee of twelve thousand five hundred dollars, what their financial circumstances are is immaterial. It is solely a question of the financial ability of those who are responsible for the payment of the bill, and I join with Mr. Allen in saying that the modern trend of authorities is not only that you may inquire into the financial responsibility of the parents, but also of the doctor who performs the operation, and I renew my objection to the question.

The Court: I shall permit the question to be answered and reserve the ruling as to the admissibility.

The Reporter: (Reading)

Q. And your father, Robert Crawford Jeffcott, was extremely interested in that son of yours at the time he was born? A. I am not quite clear on my dates, but unless I am mistaken, my father was in New York—pardon me—New Jersey, for some little time before the baby was born and after he was born. I presume he felt the normal reactions of any grandfather."

[Tr. pp. 106-109]:

"Q. Now, to go back a moment, Mr. Jeffcott, to the question of the importance of your son in the Jeffcott family, it is a fact, is it not, that your father, Robert Crawford Jeffcott, is an extremely wealthy man?

Mr. Robertson: I object to that question and object to a question being asked in a court where Mr. Allen very well knows that unless the grandfather of this baby, in some written obligation, has agreed to pay for this operation, he is under no financial responsibility for it, and is certainly not admissible in this lawsuit. He knows that the other doctor, Dr. Hugh Thompson, employed Dr. Donovan. I object to the question and would request the court to instruct counsel that any such line of inquiry is not proper in this action.

Mr. Allen: I again assert that we make no claim against Robert Crawford Jeffcott, senior, or the mother, but we maintain, as previously outlined to the court, that we have a right to go into the nature of the responsibility of this surgeon with regard to any peculiar or unusual importance that might have

been placed by the family upon this particular child, and this question is foundational as to the natural line of inheritance which would be expected to follow in this family. That is the purpose of it.

Mr. Robertson: The very fact it might be the natural line of inheritance unfortunately does not guarantee to Mr. Dave Jeffcott that he will inherit any of such money.

The Court: I suppose the importance to the plaintiff in this case of this testimony is the importance of this child to the parents.

Mr. Robertson: The parents are the only defendants in the action, and we must confine the evidence that is introduced in this case to the parties that are in this case.

The Court: Let the question be answered and the court will reserve the ruling. If this seems to the court remote and should not be considered, the court will disregard it altogether. The question may be answered with the understanding that the ruling is reserved.

The Reporter (reading):

Q. Now, to go back a moment, Mr. Jeffcott, to the question of the importance of your son in the Jeffcott family, it is a fact, is it not, that your father, Robert Crawford Jeffcott, is an extremely wealthy man? A. I have done quite a lot of work with figures in my life and had I ever seen any figures on my father's wealth or lack of wealth, I would be able to answer that question, but truly I do not know what his wealth consists of. I have never been taken into his confidence, nor to my knowledge has anybody else, as to what he has, has had, or will have, or has now.

Mr. Allen:

Q. Nevertheless, you regard him as a man of very substantial means, do you not? A. I have lived in the family quite a while and I know it has always been told to me how hard times were, and we have been instructed to be thrifty.

Q. Answer the question. Do you or do you not regard your father as a man of substantial means?

Mr. Robertson: Mr. Allen is adopting the same terms we find in the complaint. He says 'a man of substantial means'. In the complaint he says 'a reasonable fee of twelve thousand five hundred dollars'. What is 'reasonable'? What is 'substantial'? What might be a whale of a lot to someone else might be a 'reasonable' fee to another.

The Court: Answer the question.

A. Sir, I find it exceedingly difficult to answer that question, because what does constitute reasonable wealth? If somebody said to me a man has an annual income of a million dollars a year, I would understand that. I do not know what my father's income is. I know he has had things that have seemed to cost a lot of money, and I have also heard they were mortgaged heavily, and I don't know.

Mr. Allen:

Q. One of the things that seemed to cost a lot of money is a yacht upon which he employed a very extensive crew?

Mr. Robertson: May I have a continuing objection?

A. Yes, sir, I believe you are correct that on the face of it that appeared to be true.

Mr. Allen:

Q. And you would not say that those mansions he built down close to your ranch home are paid for with chicken feed, would you? A. No.

Q. He has a very substantial investment there, for a place to live, has he not? A. I do not know the cost of that. I could guess, but I do not know.

Q. What would be your guess? A. Anything from fifty thousand to two hundred thousand."

The admission of the foregoing testimony over appellants' objections was particularly prejudicial and erroneously admitted, as the foundation for its admissibility, as stated by counsel [Tr. p. 100], was the "out of the ordinary responsibility" placed upon Dr. Donovan while performing the operation and which was denied by Dr. Donovan himself [Tr. p. 225]:

"Q. Had you found out anything about the financial condition of the parties before you performed the operation? A. No, sir.

Q. Did you know anything about the grandparents? A. No, sir.

Q. And, in fact, you did not know that this was the sole grandson until after the operation was performed? A. Before I performed the operation?

Q. Yes. A. No, sir, I did not. Excuse me just a moment. May I correct that. I will change that a little bit. Someone mentioned that fact during the consultation, but who it was, I cannot say.

Q. But that did not weigh down very heavily upon your mind in the responsibility you felt for the child? A. I would feel the same responsibility if I were going to operate on a child, whether he were the first or the tenth.

Q. I appreciate your honesty, doctor. Therefore, that part of the responsibility constitutes no part of the foundation for your charge, whether he is the sole grandson, and his grandparents are worth a million or a thousand or nothing? A. No, sir; no, sir."

IX.

That the court erred in denying appellants' motion for new trial and in refusing to modify its findings of fact and conclusions of law and to reduce the amount of judgment entered therein for the reasons that the judgment was not justified by the evidence, was contrary to such evidence and to the law, and was grossly excessive; that the court had erred in admitting the evidence of Drs. Downes, Burdick and Beekman, set forth in Nos. V, VI and VII above, and the evidence pertaining to the financial condition of the parents of the appellants, as set forth in No. VIII above.

Argument.

It is difficult for the appellants to summarize this case and likewise our argument must be sketchy. To be blunt, our principal ground of appeal is that the court awarded too much money to the plaintiff for the services rendered in view of all circumstances and conditions. It is necessary that the entire evidence be read and considered by the court in that in determining what was reasonable compensation, all circumstances and conditions must be considered. The trial lasted four and one-half days and we cannot summarize all this testimony in the limited space provided for by the court rules. We will endeavor, however, to concisely set forth the high lights upon which we feel a new trial should be ordered, or a substantial reduction of the judgment decreed by the appellate court.

This case is rather novel from the standpoint of the limited legal questions under dispute. There was no dispute at the trial as to the admissibility of evidence of the ability of the patient to pay. Counsel for the appellee

admitted this principle [Tr. p. 100]. Counsel for the appellants admitted this proposition [Tr. p. 101]. Cases sustaining this modern rule are:

Citron v. Fields (1938), 85 Pac. (2d) 535, 30 Cal. App. (2d) 51;

Zumwalt v. Schwarz (1931), 112 Cal. App. 734, 297 Pac. 608;

Mount v. Reicher (1932), 140 Ore. 267, 13 Pac. (2d) 335;

Gilpi v. Wilbert (1929), 119 So. 455, 9 La. App. 170;

Pfeiffer v. Dyer (1929), 145 Atl. 284, 295 Pa. 306;

Houda v. McDonald (1930), 294 Pac. 249, 159 Wash. 561;

Young Bros. v. Succession of Von Schoeler (1922), 91 So. 551, 151 La. 73.

The only legal question upon which there is a substantial difference of opinion will be considered under Specifications of Error Nos. V, VI and VII where expert witnesses were permitted to testify under specific objection and to give their opinions as to a reasonable fee based upon a hypothetical question, which hypothetical question contained no facts showing, or tending to show the financial ability of the patient, or those responsible, to pay for such services. The examination of all of these experts disclosed that in determining a reasonable fee they all considered, as one of the important elements, the ability of the patient to pay.

I.

Specification of Error No. I relates to finding of fact No. XXVIII. The court made the following finding therein: "That one or both of the said parents promised to assist the said David C. Jeffcott financially in getting started in the cattle ranching business." Throughout the transcript of testimony it will be seen that the court seemed to consider this as being "a source of income" for said David C. Jeffcott and placed undue emphasis upon the fact that Mr. Jeffcott was able to borrow money from his parents to cover the expenses of developing and stocking his ranch, and also to defray personal living expenses until the ranch was on a profit earning basis, notwithstanding the fact that all money borrowed was done so under an express agreement that a real estate and chattel mortgage would be executed when the total amount necessary had been determined and that such real estate and chattel mortgage was executed providing for the payment of interest, amortization of principal and partial releases when sales were made. We feel it is apparent that the court was influenced by the financial condition and circumstances of Mr. Jeffcott's parents, which evidence was admitted over the objection of the appellants upon a premise and for a reason which did not exist as was subsequently brought out in the testimony of the appellee himself. This is more fully discussed under Specification of Error No. VIII.

Finding of fact No. XXVIII also sets forth in lump sum totals the amounts expended over a five-year period and the amounts earned by the appellants during the same period which casts an inaccurate and prejudicial appearance on the financial condition of the appellants on

the date when the appellee rendered his services. The court also sets forth in a lump sum the personal expenditures of the appellants over this five-year period without showing that a substantial portion of these expenditures were made necessary by the payment of income taxes when the stocks and bonds, which had been previously given him by his father, were liquidated. Initial expenses were also included, which were really ranch expenses, but were contained in his designation of "personal expenses" as proper books had not been set up at that time. Also contained in this lump sum figure was $2500.00 which the appellants had paid to the appellee and over $3500.00 for other expenses incurred in connection with the illness of the minor son who was operated by the appellee. This finding of fact, in our opinion, illustrates the attitude of the court which was created by the admission of evidence of the financial condition of the appellants' parents and improperly states the financial circumstances of the appellants.

II.

We will consider Specifications of Error Nos. II, III, and IV at one time as they are all interlocking.

The basic point in this appeal is raised under these specifications of error, to-wit, the awarding of the court was excessive and unreasonable for the following reasons:

(a) The total fee of $7,500.00, with a credit of $2,500.00 was disproportionate to other fees charged and collected by the appellee for similar operations. He testified that he had performed eighteen such operations (Finding of Fact XXX), [Tr. p. 53], for fourteen of which he received nothing as they were presumably charity

cases. For one he received $250.00, for one $350.00, for one $1,000.00, and for the other $2,500.00. In his testimony he shows no justification for making a charge of $12,500.00 for this operation, nor does he show any justification for the award of the court reducing his fee to a total of $7,500.00. He was gone from his New York office only from Saturday evening, April 1st, 1939, until Tuesday afternoon, April 4th, 1939. In one place he states that had the operation been performed in New York, he would have charged between $3,500.00 and $5,000.00 [Tr. p. 227].

Later on [Tr. pp. 233-235], he suggested that he might have charged $5,000.00. He attributed $5,000.00 of his charge to the hazards of his flight by American Airlines from Newark, New Jersey, to Tucson, Arizona [Tr. p. 228]. He knew of no business that he lost on account of absence from his office [Tr. p. 230].

(b) The fee charged and the reduced fee allowed by the court is disproportionate to the annual income of the plaintiff as his total gross income for the year of 1939. including the $2,500.00 paid by Mr. Jeffcott, was $40,887.05 [Tr. p. 262]. His net income was, roughly, $30,000.00 [Tr. p. 263]. We submit that a fee to be awarded by the court of approximately one-fourth of his entire annual income for one operation and a trip by plane to Tucson, Arizona, from New York, which kept him away from his office actually for only one and one-half working days, is an exorbitant and excessive award.

(c) That the fee is excessive and unreasonable in view of the financial ability of the appellants to pay. The court finds, in Finding of Fact No. XXVIII, that at the time of the employment of the appellee, the appellants

were worth approximately $80,000.00 net, the ranch being valued at approximately $150,000.00, and subject to an indebtedness of approximately $70,000.00. The appellants had no net income at that time, although voluntarily they went ahead to show that by 1942 they should have an annual income of between $5,000.00 and $8,000.00 (before payment of income taxes) [Tr. p. 52]. It is a matter of common knowledge, and such practice was testified to by the experts called by the appellants, that outstanding surgeons usually make a charge for a major operation of approximately one-tenth of a person's annual income, or one month's income. Dr. Carrell so testified [Tr. p. 475]; Dr. Gore so testified [Tr. p. 492]; and Dr. Holbrook so testified [Tr. p. 515]. All of these experts, however, conceded that an additional fee should be allowed where a surgeon is called from New York to Arizona. Dr. Holbrook fixed a fee of $2,000.00 [Tr. p. 530]; Dr. Gore fixed a maximum fee of between $1,500.00 and $2,000.00 [Tr. p. 507]; and Dr. Carrell fixed a maximum fee of $2,000.00, plus expenses [Tr. p. 474].

An examination of the qualifications of these three experts will disclose that they compare very favorably with those of Dr. Donovan and in view of the fact that all three of these doctors practice in Tucson, Arizona, which is a recognized health resort, they have a much better opportunity of knowing the fee and practices of outstanding physicians and surgeons all over the country than would a doctor whose practice is confined to New York City.

(d) We feel it is evident from the size of the fee awarded that the trial court was influenced by testimony

which was erroneously admitted as to the financial condition of defendants' parents. A reading of the transcript of testimony will show that the court's attitude was completely reversed from and after the time when this testimony came into the trial. It is difficult to point out this assertion by specific examples, as the cold, written text of the transcript of testimony cannot portray the tone of voice and attitude of the court. Some indication of this, however, is given in the way the court ruled upon various objections made by the defendants' counsel and comments in the course of such rulings. We will attempt to point out in oral argument a number of these instances, and although each isolated ruling by the court, or statement by the court, in our opinion, did not constitute reversible error, the cumulative effect of such rulings can lead but to the conclusion that the court was prejudiced by this evidence. At no place in the transcript of testimony is there any evidence that the relationship between the father and mother and the son was other than one of a strict businesslike nature, and there is certainly no testimony or evidence in the case which even tends to show that the parents assumed any financial responsibility for the payment of this fee, or will in any way aid or assist the defendants in paying it. Such is not the case.

A typical example of this attitude is set forth on page 450, transcript, and reads as follows:

> "The Court: This relationship between the witness, the defendant in this case, and the one to whom this indebtedness is due is before the court. How much further can you go in this matter, Mr. Allen? The relationship between this defendant and the man to whom this indebtedness, this sum, is due for ad-

vances on the mortgage, is the relationship of father and son, isn't that all?

Mr. Allen: I withdraw the question in order to save time in the matter.

The Court: I do not see the necessity of going into the ramifications. The implication is apparent as to the relationship and the establishment of the indebtedness. If there is some other purpose, all right."

The court's statement: "The implication is apparent as to the relationship and establishment of the indebtedness" clearly demonstrates that the court had fallen a victim to the insidious and undisclosed intention of the appellee in having previously secured admission of this evidence for a reason which was later denied by Dr. Donovan. It is another illustration of the fallacy that a court admits evidence and if it subsequently finds it not material, that it can disregard it. The trial court is still a human being and can not "unring a bell".

III.

The appellee offered the testimony of Drs. William A. Downes, Carl G. Burdick and Fenwick Beekman by deposition, covered by Specifications of Error Nos. V, VI and VII. The court interrupted the reading of these depositions into the record [Tr. p. 313]. By stipulation [Tr. p. 79], it was agreed that the reporter in preparing the transcript of testimony might insert the balance of the testimony of all three doctors and all objections therein contained, and it was further stipulated that all objections made by attorney for the defendants to the portion of the deposition which had been read would be considered as having been made to the remaining portions of

said depositions insofar as the same might be applicable. A reading of these depositions will show that each of these witnesses expressed an opinion based upon a long hypothetical question which contained no facts showing, or any reference to the financial ability of the appellants to pay a fee, although each of these experts readily admitted that one of the most important considerations in determining a fee is the ability of the patient to pay [Tr. p. 330—William A. Downes]:

> "XQ. 105. What factors would you take into consideration in estimating the fairness of another surgeon's charge? A. To begin with, it would depend entirely upon the ability to pay and the social standing of the individual.
>
> XQ. 106. And the skill of the surgeon would be of secondary consideration? A. We assume that the surgeon is skillful.
>
> XQ. 107. And a doctor need not be what I would call in the vernacular 'a top flight surgeon' in order to perform a skillful operation, need he? A. No."

We feel that the hypothetical question submitted to these doctors and their answers is a perfect example of this ridiculous practice in our courts. A question encompassing ten pages is submitted to a doctor. He has either been thoroughly prepared prior to the submission of such a question, or his answer is well known, regardless of what may be contained in the question. An answer is then given which is a surprise to no one. The question propounded is "padded to the queen's taste" (quoting Dr. Burdick), and then the opposing attorney is supposed to break down this opinion.

The worst feature about permitting these three experts to answer this hypothetical question and express an opinion as to what would be a reasonable fee, where the question contained no facts as to the financial condition of the appellants, is the fact that their answers were the ultimate issues to be found by the court. The authorities hold this to be particularly improper. As a general rule all material facts must be contained in a hypothetical question unless there is a dispute as to certain issues before an expert is to be permitted to testify. When it calls for an answer on the ultimate issue of the case, this must be done.

Jones on Evidence, 4th Ed., Vol. 2, Sec. 371, page 694, Note 17;

22 *C. J.* 711;

DeDonato v. Wells (1931), 328 Mo. 448, 41 S. W. (2d) 184, 82 A. L. R. 1331;

Hahn v. Hammerstein (1917), 272 Mo. 248 (at 262), 198 S. W. 833.

All of these doctors admitted the importance of knowledge of the financial ability of the patient to pay in fixing a fee, yet they answered a question which ignored this important issue. Of what earthly good is this testimony to the court other than to place in the court's mind the fact that three prominent New York doctors thought that Dr. Donovan should receive a fee in excess of $10,000.00? Certainly these doctors would not have been called to testify unless Dr. Donovan's attorney knew this in advance. We feel the admission of this testimony was highly improper and prejudicial and added its cumulative weight to the court's mind which resulted in an award of compen-

sation of $7,500.00 for one operation, a few subsequent consultations, and an absence from New York of some sixty hours.

IV.

Specification of Error No. VIII speaks for itself. It is hard to believe that counsel for the appellee had not discussed this case with Dr. Donovan before commencing the trial. His thorough comprehension of the medical aspects of the case, the length and completeness of the hypothetical question, and his general knowledge of the facts of the case amply demonstrated hours of work in preparation. We therefore say it is hard to believe that he had neglected to ask Dr. Donovan whether or not he knew that Robert C. Jeffcott was the only grandson, that his grandfather was extremely wealthy, and that the grandfather was extremely interested in said grandson before Dr. Donovan performed the operation. Notwithstanding our belief that counsel had inquired of Dr. Donovan concerning these matters, and notwithstanding the fact that Dr. Donovan was sitting beside him, counsel stated that his purpose in attempting to bring out the financial condition of the grandfather, and the fact that the baby was a highly desired grandson, was to show the added "out of the ordinary" responsibility placed upon the shoulders of Dr. Donovan when performing this particular operation. If counsel had not inquired of these facts when he stated to the court that this was his purpose, Dr. Donovan should have communicated to his counsel the fact that these matters were not known by him prior to his performing the operation and even had they been, they would not have added to his feeling of responsibility, as he finally testified [Tr. p. 225]. The court stated to plaintiff's counsel [Tr. p. 100]: "Unless you make a showing as

to the materiality, it is not admissible." This showing and purpose was made, the testimony admitted, and then the purpose failed. Its effect upon the court was not, however, erased. We feel that a new trial should be awarded, or preferably a substantial reduction made by this court for this reason alone. We feel it is apparent, from a consideration of the entire testimony, that Dr. Donovan's charge was made with the thought in mind that the grandfather would pay it, after he learned that the grandfather was a man of wealth, and we feel that the trial court was led to this state of mind by the improper admission of this evidence. Such is not the case and a judgment of a court of law should not be predicated upon matters and things improperly in the record which can form no part of a proper consideration of the case.

In this connection we wish to cite to the court a few cases which show comparative fees that have been awarded. Unfortunately, there are not many illustrative cases, but those that are found show the charges in this case to be exorbitant.

In *O'Ferrell v. National Bridge Co.* (1928), 165 La. 963, 116 So. 399, a fee of $6,500.00 was held to be not excessive for medical services covering a period of several months to a group of seven men who were seriously injured when they fell from a bridge being constructed by the defendant.

In *Succession of Munch* (1928), 167 La. 48, 118 So. 688, a fee of $2,500.00 was approved in a claim against the estate of a deceased who died leaving a net estate of $250.000.00, for services covering a thirty-day period and two major operations.

An instance of an opposite extreme is found in the case of *Eddy v. Healey* (1918), 209 Ill. App. 270 (no Re-

porter's citation available), where a fee of $100.00 was approved for a very delicate throat operation and considerable post-operative attention.

We feel that a calm and deliberate consideration of the evidence in this case will lead this court to the conclusion that the trial court was influenced by evidence which was improperly admitted into the record, and that its award was unreasonable and excessive, and that either a substantial reduction should be ordered by this court to avoid additional delay, work and expense for all parties involved, or in the alternative, award a new trial with instructions.

We respectfully request the right to orally argue this matter before the court at such time and place as may be fixed.

Respectfully submitted,

DARNELL & ROBERTSON,

Attorneys for Appellants.